82-1615

No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

SEBASTIAN DIAZ-SALAZAR,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether due process requires the Board of Immigration Appeals to give an undocumented alien a hearing on his application for suspension of deportation pursuant to 8 U.S.C. §1254(a)(1), when the undocumented alien establishes by evidentiary material, in compliance with Board of Immigration Appeals regulations 8 C.F.R. §3.2 and §3.8(a), a *prima facie* case of extreme hardship to himself, his wife and his two United States citizen children?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Sebastian Diaz-Salazar, by counsel, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals Seventh Circuit is a published opinion not yet printed in the federal reporter system. The opinion appears in the appendix at App. 1-16. The opinion of the Board of Immigration Appeals is not reported. The opinion appears in the appendix at App. 19.

JURISDICTION

The judgment of the Court of Appeals (App. 17) was entered on March 1, 1983. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).[1]

STATUTE AND REGULATIONS INVOLVED

8 U.S.C. §1254(a)(1) provides in pertinent part:

> As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—
>
> (1) is deportable under any law of the United States * * *; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence * * *.

8 C.F.R. §3.2 provides in pertinent part:

> Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an

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[1] Circuit Judge Cudahy for the Seventh Circuit stayed the mandate pending the outcome of this Petition on March 22, 1983.

> opportunity to apply for any form of discretionary relief be granted * * * unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing.

8 C.F.R. §3.8(a) provides in pertinent part:

> Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material.

STATEMENT

Petitioner Sebastian Diaz-Salazar entered the United States illegally in 1974 as an immigrant with a third grade education from Mexico because he was unable to secure employment in Mexico. He has been living and working in Chicago since that time. App. 2, 9.[2]

By May, 1981, Diaz-Salazar had acquired seven years residence in the United States and thus became eligible to apply for suspension of deportation on grounds of extreme hardship pursuant to §244 of the Immigration Act, 8 U.S.C. §1254. The petitioner filed such application on August 6, 1981.[3] App. 3. Along with the application for

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[2] App. refers to citations to appendix.

[3] Originally, the Immigration and Naturalization Service moved to deport him in September of 1980 and at an October hearing, he was granted voluntary deportation within 90 days. Diaz-Salazar appealed the decision to deport him to the Board of Immigration Appeals and requested a joint hearing with the woman whom he considered to be his common-law wife. The BIA denied this appeal on February 4, 1981, and on March 27, the INS set the date of deportation for April 22, 1981. On April 3, 1981, Diaz-Salazar filed a petition with the Seventh Circuit Court of Appeals to review this decision. On August 1, 1981, this petition was dismissed as moot when Diaz-Salazar filed his application for suspension of deportation on August 6, 1981. App. 3.

suspension of deportation, the petitioner filed a motion to reopen the deportation proceeding which included various affidavits and other evidentiary material as required by 8 C.F.R. §3.8(a). (R-44-96)[4]

The motion to reopen stated that this deportation would cause extreme hardship to himself, his wife and two United States citizen children. (R-44-45) The affidavits and the evidentiary material was presented to show that the petitioner had established a *prima facie* case of eligibility for the relief of suspension of deportation pursuant to §244.

A social evaluation and report was submitted by a licensed social worker, Mrs. Maria Luisa Maurer, M.S.W., who indicated that the deportation of petitioner would create extreme hardship to petitioner and his family. It stated:

> The couple state they see their future in terms of providing a home for their children in the U.S. Their lack of formal education would create extreme hardship to them in seeking employment in Mexico. Their citizen children would suffer unnecessarily. Mrs. Diaz' extended family is here and Mr. Diaz has lost contact with his extended family. His first wife is already living with someone else. From their perspective, they have nothing to offer their children there; no economic stability, no love of extended family members, and the insecurity intrinsic to the unknown.
>
> . . .
>
> It is evident that the couple have built strong family and community ties in the Chicago area and that they have achieved a position of respect through hard work and sacrifice which gives a significant boost to their morale and egos. Deportation threatens to destroy all that they have achieved over the years and to tear

[4] "R" refers to the certified administrative record in the Court of Appeals.

> apart their close family nucleus and to deprive their children of all of the advantages of their birthright and of having a close family and security.
>
> Their deportation to Mexico would cause a severe blow to the entire family and would not be without impact to the community. Thus, it is my recommendation that the court be lenient in this case and allow the U.S. citizen children, Alfredo and Sylema, the joy, stability, security and devotion of a united family. App. 14, 15.

The motion to reopen also included three affidavits from the petitioner's place of employment and recent income tax returns. (R-47-52, 72-87) Two affidavits were from fellow co-workers and one from his employer indicating that he is an individual of fine moral character. (R 47-52) Also submitted was a letter from the Chicago Police Department indicating he had no criminal record (R 67), and certified copies of the birth certificates of his two U.S. citizen children, Alfredo Diaz and Sylema Diaz, were also submitted with this application. (R 65-66)

On March 30, 1982,[5] the BIA denied the petitioner's motion to reopen and denied him an evidentiary hearing. The BIA stated that he ". . . has made no showing that

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[5] During the period of time petitioner's motion to reopen the BIA decision was pending, the INS made various attempts to deport him. Counsel for the petitioner, in response to such activities, took various legal action to prevent the deportation while the BIA was deciding the motion. This included filing a petition to review BIA's denial of a stay pending its determination of the motion to reopen in the Seventh Circuit (No. 82-1130). The government objected to this petition on jurisdictional grounds and requested a reprimand and costs against counsel. The Court of Appeals held that there was no jurisdiction, but denied the request for a reprimand and costs against counsel. See majority opinion for the details of the various legal actions. App. 4-5.

he or his United States children will suffer the degree of hardship if deported that section 244(a) was designed to alleviate . . . ." (App. 21) Both children are under the age of three and thus too young to have developed any meaningful ties to the United States. The adjustments they must make to life in another country cannot be characterized as "extreme hardship".[6] (App. 21)

The petitioner, on April 16, 1982, filed a petition to review the BIA decision in the United States Court of Appeals for the Seventh Circuit pursuant to 8 U.S.C. §1105 (a). (App. 4) The Seventh Circuit ruled two to one that the BIA did not abuse its discretion in denying petitioner's motion to reopen. Judges Cudahy and Posner, for the majority, ruled "no special circumstances are presented sufficient to bring petitioner's situation within the extreme hardship standard" which would warrant an evidentiary hearing. (App. 7) The Court of Appeals relied heavily on this Court's *per curiam* opinion in *INS* v. *Wang*, 450 U.S. 139 (1980). (App. 5-6)

Judge Weick of the Sixth Circuit, sitting by designation, dissented, ruling that the finding of the BIA that "petitioner did not establish a *prima facie* case is clearly erroneous, as it was proven by overwhelming evidence and BIA abused its discretion in not granting an evidentiary hearing on the merits of the case." (App. 15)

The dissent stated:

> It was shown by overwhelming evidence that the two minor children, a boy and girl, both under three years of age, who are American citizens, would suffer extreme hardship, and the Board of Immigration Ap-

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[6] The BIA also denied the motion to reopen based on purely discretionary grounds due to what the BIA characterized as dilatory tactics. (App. 22)

> peals did not give this matter adequate consideration. Diaz-Salazar left Mexico because he was unable to support himself and he came to this country. It has been shown by overwhelming evidence that the two minor children would suffer extreme hardship if he were deported to Mexico, where he could not earn a living to support himself and the children when in fact that is the very reason he left Mexico. He could not even support himself. He now has a lucrative position in Chicago, earning $20,000 a year and it is suggested that he take them back to Mexico, where he could not even support himself. My concern is entirely based on the hardship suffered by these two minor children who are citizens of the United States, and I think that they are entitled to due process of law and to have an adequate hearing. The Board of Immigration Appeals did not even allow the witness as to social evaluation to testify as to extreme hardship, and this is another ground of error. (App. 11-12)

Judge Weick, contrary to the majority, believed that this Court, by its *per curiam* opinion in *Wang*, never intended to deprive a petitioner of his right to an evidentiary hearing in all cases. (App. 14)

It is from this 2-1 decision of the Court of Appeals that the petitioner files a Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

Over the last decade, this Court has been consistent in holding that when substantial individual interests created by a statutory scheme are at stake, that individual is entitled to a meaningful hearing. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Mathews* v. *Eldridge*, 424 U.S. 319 (1976); *Bell* v. *Burson*, 402 U.S. 535 (1971); *Arnett* v. *Kennedy*, 416 U.S. 134 (1974).

1. The instant case comes before this Court in the context of the petitioner requesting his deportation be suspended due to extreme hardship. There can be no doubt that the interests of Diaz-Salazar and his two American children are indeed substantial and weighty; for as a practical matter, the deportation of Salazar will result in his children returning with him to Mexico, thereby effectively causing the expulsion of his two children from their homeland. This serious deprivation should not be allowed to occur without affording the petitioner and his family the opportunity to present his claim for extreme hardship in a meaningful hearing. The crucial question before this Court is what type of evidentiary hearing or review the petitioner is entitled to, a question that has not been fully decided by this Court.

8 U.S.C. §1254(a) provides that an undocumented alien may apply for suspension of deportation if his deportation would result in extreme hardship to himself or his spouse, parent or child who is a citizen of the United States.[7] For further discussion of application of this statu-

[7] There are other factors that the petitioner must meet before he is eligible for such relief; but Government concedes that the petitioner fulfills these requirements.

tory scheme, see this Court's *per curiam* opinion in *INS* v. *Wang*, 450 U.S. 139 at 140 (1981).

In the instant case, the petitioner submitted his application based on the extreme hardship that his wife and two citizen children will experience if he is deported. The petitioner has brought this request for suspension of deportation in the context of a motion to reopen the original deportation proceedings. The appropriate regulation requires new facts to be proved at the reopened hearing supported by affidavits and other evidentiary material. 8 C.F.R. Part 3 §3.8.

A petitioner who does not comply with this provision is not entitled to a hearing, as was the case with the petitioner in *Wang*. However, in the instant case, Diaz-Salazar complied with this regulation and the affidavits and social report that he submitted were a basis to support a *prima facie* case of suspension of deportation which would entitle him to a hearing on the issue.

In discussing the characteristics of a motion to reopen a court has stated:

> The motion to reopen is only a preliminary proceeding, representing the first in a series of hurdles that the alien must clear to obtain relief under §1254 (a)(1). See *Urbano de Malaluan* v. *INS*, 577 F.2d at 592-93. The motion to reopen is not intended to be a substitute for a hearing. Its purpose is merely to allow the Board to screen out those claims that clearly lack merit and thus can be disposed of without a hearing. The function of the Board at the motion-to-reopen stage of the proceedings is not to make a determination of the alien's eligibility for relief under §1254(a)(1). The function of the Board is merely to determine whether the alien has set forth a *prima facie* case of eligibility for relief. *Reyes* v. *INS*, 673 F.2d 1087 at 1089 (8th Cir. 1982).

In *Reyes*, the court stated:

> Since motions to reopen are decided without benefit of a hearing, common notions of fair play and substantial justice generally require that the Board accept as true the facts stated in an aliens affidavits in ruling on his or her motion. *Id.* By rejecting the facts stated in Reyes' affidavits without a hearing, the Board denied Reyes' motion without giving her an opportunity to demonstrate that her version of the facts was true. 673 F.2d at 1090.

The court noted in *Reyes*:

> We only note that it seems inconsistent with the screening function served by the motion to reopen as well as fundamentally unfair to the movant for the Board to weigh the equities before granting a hearing to enable the alien to present his or her case in full. 673 F.2d at 1091.

Diaz-Salazar complied with the necessary regulations and submitted affidavits and a social evaluation, which at the minimum establish a *prima facie* case of extreme hardship.[8] However, he did not receive a hearing to present his case in full.

2. In the recent decision of *Landon* v. *Plasencia*, ... U.S. ....., 74 L.Ed.2d 21 (1982), this court held that before a permanent resident is prevented from living in the United States, he is entitled to due process rights. See also, *Plyler* v. *Doe*, ... U.S. ....., 72 L.Ed.2d 786 (1982) where this Court held that undocumented alien children have fourteenth amendment protection concerning their right to equal treatment in education provided by the states.

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[8] The dissent found that he presented overwhelming evidence in support of extreme hardship. At App. 15. This, of course, should not be necessary to mandate a hearing.

The court in *Plasencia* found that an alien is entitled to due process consideration at an exclusion hearing. The court in this decision announced that the following factors must be considered in determining the constitutional sufficiency of the due process to be accorded in immigration matters: the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures. 74 L.Ed.2d 21, 33. In balancing all the above factors, Diaz-Salazar should have been granted an evidentiary hearing at which he could have presented his evidence regarding hardship in a meaningful setting.

The interest at stake for Diaz-Salazar and his family is undeniably an extremely important one. *Landon* v. *Plasencia, supra.* In the instant case, the petitioner stands to lose the right "to stay and live and work in this land of freedom." *Bridges* v. *Wixon*, 326 U.S. 135 at 154 (1945), which right would also be lost by his two American children, who in all likelihood would return with him to Mexico. Furthermore, the petitioner has an interest in having his children raised as American citizens in an American society, with all of its attendant benefits, including education. This opportunity would be denied them if they were to return to Mexico, a country which is not even their homeland.

This court has determined that the denial of a child's educational opportunity is not a matter to be taken lightly. In the recent decision of *Plyler* v. *Doe*, 72 L.Ed.2d 786 (1982), it held that undocumented children were entitled to a free public education. Thus, there is the unduly harsh

result in the instant case of the petitioner's American children being denied a right that non-American children have been held entitled to. In reaching the decision in *Plyler*, this Court stated:

> But more is involved in this case than the abstract question whether §21.031 discriminates against a suspect class, or whether education is a fundamental right. Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. 72 L.Ed. at 803.

The petitioner's children will be subject to this same situation if they are forced to return to Mexico with their father. One can easily envision the scenario of the children returning to Mexico and being sentenced to a life of deprivation and illiteracy until they are old enough to return to this country, which is their homeland. They will return here in a condition that will not allow them to enjoy the advantages of what their country has to offer, but rather will return here to be sentenced to a life of second class citizenship.[9] The dissent in the instant case realized

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[9] The government has taken the position that these two citizen children are too young to have developed any meaningful ties to the United States. BIA decision, p. 2 at App. 21. Counsel for the petitioner is at a loss to understand why age has become a determining factor in deciding when a United States citizen will have his rights compromised. Petitioner submits that the status of citizenship is not based on how young or old a person is, and similarly, the rights and benefits associated with such citizenship cannot be based on the age of the person or the status of the parent. See, *Trimble* v. *Gordon*, 430 U.S. 762 (1977).

the consequences of this action, and felt that on the facts presented an evidentiary hearing was required. However, the majority felt that their decision was mandated by this Court's *per curiam* decision in *INS* v. *Wang*.

However, the situation of the petitioner in the instant case is clearly distinguishable from that of the family in *Wang*. There, *Wang* did not comply with the regulations requiring that documentary evidence be attached to the petition, whereas in the instant case, petitioner did present such evidence. Also, the factual circumstances in *Wang* were unusual in nature. The petitioner in *Wang* was a highly educated individual of substantial wealth who was in the position of either having his children go to an American school abroad, or having his children remain in this country and go to boarding school. Obviously, the petitioner in the instant case is not in a position to provide this type of environment for his children.

Clearly, this Court's opinion in *Wang* does not justify nor mandate the majority decision of the Court of Appeals. As was correctly pointed out by Judge Weick in his dissenting opinion, *Wang* never intended to deprive petitioners of their right to an evidentiary hearing in all cases. This is especially true when the petitioner has attached a social evaluation which indicates the extreme hardship the family would undergo if petitioner were deported. See also, *Ravancho* v. *INS*, 658 F.2d 169 (3rd Cir. 1981).

Turning to the interests of the government in this matter, the government will not be harmed by granting the petitioner and his family an evidentiary hearing. The government has procedures which it can rely on to reject requests for hearings that are not supported by evidentiary materials, as the *Wang* case amply illustrated.

Also, allowing the petitioner a hearing in the instant case would not place an undue administrative burden on the INS. The government, in its Petition for a Writ of Certiorari filed with this Court in the *Wang* case, stated that the Board of Immigration Appeals at that point in time was only processing some 200 motions to reopen, to apply for suspension of deportation per year, 95% of which were denied without a hearing.[10] This figure is clearly not an excessive or unmanageable burden for the INS to hear, especially when one compares the number of hearings held in other administrative areas such as public aid and social security, unemployment insurance, etc. Allowing Diaz-Salazar a hearing in which to present his evidence as to extreme hardship will clearly not cause the administrative apparatus to break down or come to a halt, and to argue otherwise is nothing more than a scare tactic that has no basis in fact.

Furthermore, it could also be argued that this Court has allowed administrative expense to be a factor to be considered in determining whether a hearing is warranted. *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). However, balancing the important interests of the petitioner and his family that are at stake, with the small number of motions to reopen being heard by the Board, there can be no doubt that the petitioner is entitled to an evidentiary hearing on his motion. The stakes for Diaz-Salazar and his family are great, and the determination to permanently disrupt the family unit should not be made on the basis of a cursory agency review and rejection that occurs as a matter of course. *See Prapavat* v. *INS*, 662 F.2d 561 (9th Cir.

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[10] It is unknown how many of these motions comply with the administrative regulations in the first instance. See *INS* v. *Wang* petition for a writ of certiorari 80-485 pg. 15.

1981); *Sida* v. *INS*, 665 F.2d 851 (9th Cir. 1981). Such a policy does not comport with either due process dictates or notions of fundamental fairness.

It is true that the government has discretion in determining whether a hearing is warranted; however, this discretion is not unbridled and total in scope. If that were the case, there would be no need for judicial review of decisions made by the INS. This agency discretion should be tested on a case by case determination, and the strong facts presented by the instant case justify granting a hearing to the petitioner and his family. The government should not have an interest in deporting the petitioner without giving him an opportunity to fully and fairly present all the facts and arguments in his favor so that a fair and equitable decision can be reached. This does not mean that in all situations the hearing will produce evidence that will change the result, but what it does ensure is that a decision of vital importance that affects the whole family, including American children, will have been based on a full and fair presentation of all the relevant facts in a meaningful setting.

These arguments are even more crucial in the immigration context because if an individual is erroneously deported based on an incomplete or cursory examination of his case by the INS, that individual has no recourse due to the fact that deportation has already been accomplished. Once the individual is out of the country the case is moot (see *Newton* v. *INS*, 662 F.2d 1193 (3d Cir. 1980)), and whatever violations have occurred go unredressed; the wrong is irreversible. This Court should not sanction such a harsh and unjust result, especially if it can be remedied by simply granting a hearing to those individuals who have submitted evidence that justifies such relief.

3. Not only does the instant case present a substantial question that needs clarification after this Court's decision in *Wang*, but the majority decision is in conflict with many other circuit court opinions as to whether a hearing is required in this factual situation.[11] In discussing *Wang*, the majority decision stated:

> Moreover, the *Wang* case instructs us that the application of the extreme hardship standard is an individual case is a task allotted primarily to the INS and not to the courts. *Id.* at 144, App. 6.

Thus, it is clear that the majority felt that the instant case did not present a factual situation that required an evidentiary hearing.

The majority decision is contrary to a substantial number of decisions from the third and ninth circuits with similar factual patterns. *Sida* v. *INS*, 655 F.2d 859 (9th Cir. 1981); *Prapavat* v. *INS*, 662 F.2d 561 (9th Cir. 1981); *Ravancho* v. *INS*, 658 F.2d 169 (3d Cir. 1981); *Santana-Figuero* v. *INS*, 644 F.2d 1354 (9th Cir. 1981); *Reyes* v. *INS*, 673 F.2d 1087 (9th Cir. 1982); *Mejia-Carrillo* v. *INS*, 656 F.2d 520 (9th Cir. 1981); *Chae Kim Ro* v. *INS*, 670 F.2d 114 (9th Cir. 1982).[12]

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[11] The petitioners in *Wang*, in their Petition for Rehearing, predicted that such conflict would occur among the circuits as a result of this Court's *per curiam* decision in that case. This prediction has been borne out as evidenced by the many conflicting circuit opinions analyzing *Wang* and its parameters.

[12] Even the Ninth Circuit is split among its own panels. See *Hee Yung Ahn* v. *INS*, 651 F.2d 1285 (9th Cir. 1981), where the majority criticizes the other Ninth Circuit cases as improper interpretations of *Wang*, but see the dissenting opinion of Senior District Judge East which is in accord with the other Ninth Circuit cases.

The court stated in *Prapavat* v. *INS*, 662 F.2d 561 (9th Cir. 1981) that:

> The existence of a citizen child, deportation to an underdeveloped country that offers minimal opportunities for suitable employment, the child's lack of knowledge of that country's language, her health problems, and the economic loss from the forced liquidation of the Prapavats' assets must all be assessed in combination. 662 F.2d 561 at 563.

Also, in *Mejia-Carrillo* v. *INS*, 656 F.2d 520, the Ninth Circuit has stated:

> Under §244(a), economic loss alone does not establish extreme hardship, but it is still a fact to consider in determining eligibility for suspension of deportation. [Cites omitted.] . . . In addition, the Board must consider personal and emotional hardships which result from deportation. [Cites omitted.] . . . Included among these are the personal hardships which flow naturally from economic loss—decreased health care, educational opportunities, and general material welfare. The most important single factor may be the separation of the alien from family living in the United States. In fact, this court has stated that separation from family alone may establish extreme hardship. 656 F.2d at 522.

In addition, the court in *Sida* v. *INS*, 665 F.2d 851 (9th Cir. 1981) states:

> . . . just as an alien is entitled to consideration of all relevant factors that may establish extreme hardship, an alien should be entitled to consideration of new evidence presented in support of a motion to reopen. Otherwise, we open the door to potentially arbitrary administrative decisions as to what new evidence will be considered and what new evidence will be cast aside. *The better approach requires the BIA to consider an alien's newly available evidence and to rule on the merits. It does not allow the BIA to refuse to consider new evidence whenever it feels that the alien for*

> *whatever reason, does not merit any consideration.* 665 F.2d 851 at 854. (emphasis added)

Furthermore, the majority decision is in direct conflict with the Third Circuit decision of *Ravancho* v. *INS*, 658 F.2d 169 (1981). In *Ravancho*, the court reversed the BIA for failure ot grant a motion to reopen the deportation proceeding to consider psychiatric evaluations of the petitioner's American child at a hearing.

The situation in the instant case is similar. The petitioner submitted a social evaluation indicating the extreme hardship the petitioner and his family would suffer if he was deported.[13]

It is also significant to note that the government in the instant case has conceded that there is conflict among the circuits in their interpretation and application of *Wang*.[14]

However, while arguing that the precedent favorable to the petitioner should not be followed because those deci-

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[13] The dissent in the instant case held that this was an independent basis for reversal. The majority opinion considered this material in the social evaluation as being merely cummulative in nature.

In accord with this majority opinion is the dissent in *Ravancho* v. *INS* at 658 F.2d at 177, and *Gomez-Gomez* v. *INS*, 681 F.2d 1347 (11th Cir. 1982). This conflict further indicates the depth and magnitude of the confusion regarding this important matter.

[14] In its Brief for Respondent submitted in the court below, the government stated:

> Since the decision in *INS* v. *Wang*, however, both the Third and Ninth Circuits have continued to conduct what amounts to *de novo* review of the "extreme hardship" issue and to disre gard the BIA's narrow construction and application of the term. *See, Prapavat* v. *INS*, 662 F.2d 561 (9th Cir. 1981); *Ravancho* v. *INS*, 568 F.2d 169 (3rd Cir. 1981); *Mejia-Car-*

(footnote continued)

sions were clearly erroneous, the government did not file a Petition for Writ of Certiorari to this Court to review any of these allegedly erroneous decisions, and to alleviate the serious conflict that exists in this area. The dissent found this activity suspect. App. 14.

The instant decision is not only in conflict with the Third and Ninth Circuits, but Fifth, Sixth and Eighth Circuit decisions all appear to contradict the majority decision. *Vargas-Gonzalez* v. *INS*, 647 F.2d 457 (5th Cir. 1981); *Wright* v. *INS*, 673 F.2d 153 (6th Cir. 1982); *Rios-Pineda* v. *INS*, 673 F.2d 225 (8th Cir. 1982). These decisions stand for the proposition that when the interests of U.S. citizen children are at stake, the petitioner is entitled to a hearing on his application for suspension of deportation.

In *Wright* v. *INS*, 673 F.2d 153, 158 (6th Cir. 1982), the court not only granted the petition for review, it also set aside the order of deportation and remanded with instructions to dismiss the order to show cause, thereby terminating the deportation proceeding. The court stated:

(footnote continued)

rillo v. *INS*, 656 F.2d 520 (9th Cir. 1981); and *Santana-Figuero* v. *INS*, 644 F.2d 1354 (9th Cir. 1981). This is the authority upon which Diaz-Salazar has relied in arguing that he made a *prima facie* showing of "extreme hardship" and is entitled to reopen his deportation proceedings. (See Petitioner's Brief pp. 16-17) These authorities, however, are not the sort of precedent the Seventh Circuit should follow. They are contrary to the decision in *INS* v. *Wang*, and therefore are clearly erroneous. *Ravancho* v. *INS*, 658 F.2d at 181 (Aldisert, J., *dissenting*); *Hee Yung Ahn* v. *INS*, 651 F.2d 1285, 1287 n. 1 (9th Cir. 1981). Brief for Respondent, p. 15.

However, two circuit cases have reduced *Wang* to a case standing for the proposition that there must be strict compliance with the regulation before relief may be granted. *Vargas-Gonzalez* v. *INS*, 647 F.2d 457, n. 1 458 (5th Cir. 1981) and *Reyes* v. *INS*, 673 F.2d 1087, n. 3 1090 (9th Cir. 1982).

> The Board should have also related that Jasette had an equity in a house which she purchased from her earnings for several years as an employee of the Fisher Body Division of General Motors. She will lose this equity and have to take her child to Jamaica if the INS order of deportation is enforced, a very real disaster and hardship. The daughter who is a United States citizen should not be treated this way. In 1982, Jasette is still living in this country and supporting her five year old citizen daughter. With all the long delay, there is certainly nothing equitable about the order of deportation.

In *Rios-Pineda* v. *INS*, 673 F.2d 225 (8th Cir. 1982), the court held that where aliens following their entry without inspection had been physically present in United States continuously since May 1, 1974 and had met seven-year continuous presence requirement during pendency of appeal, where husband alien in addition to being homeowner had been gainfully employed since 1974, and where both aliens' children were born in United States and have resided there since birth, aliens were entitled to consideration and ruling on their claim that they were entitled to suspension of deportation on a proper motion to reopen. Immigration and Nationality Act, §244(a)(1), 8 U.S.C.A. §1254(a)(1).

The petitioner in this case has the same compelling equities as *Wright*, *Rios-Pineda*, *Ravancho* and *Reyes* and therefore he should receive the same relief. As the situation presently stands, the relief accorded a petitioner depends on what circuit he resides in.[15] It is manifestly un-

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[15] 8 U.S.C. §1105(a)(2) states:

> the venue of any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this Act, of the petitioner, but not in more than one circuit.

fair that a petitioner's right to a hearing should depend on the location of his residence. This Court should not tolerate such conflict regarding this important issue.

CONCLUSION

The petition for writ of certiorari should be granted, or in the alternative, this case be remanded to the Court of Appeals in light of this Court's opinion in *Landon* v. *Plasencia*, ... U.S. .....,72 L.Ed.2d 786 (1982).

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 82-1130 and 82-1610

SEBASTIAN DIAZ-SALAZAR,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE and THE BOARD OF IMMIGRATION APPEALS,

Respondents.

Petition for Review of an Order of the Immigration and Naturalization Service and the Board of Immigration Appeals

ARGUED SEPTEMBER 15, 1982—DECIDED MARCH 1, 1983

Before CUDAHY and POSNER, *Circuit Judges*, and WEICK, *Senior Circuit Judge.**

CUDAHY, *Circuit Judge.* Petitioner Sebastian Diaz-Salazar ("Diaz-Salazar") asks us to review the Board of Immigration Appeals' ("BIA") denial of his petition to

* The Honorable Paul C. Weick, Senior Circuit Judge of the Sixth Circuit Court of Appeals, is sitting by designation.

stay deportation and to reopen deportation proceedings. Two consolidated petitions are before us: No. 82-1130, a petition for review of an oral denial of a motion to stay deportation, and No. 82-1610, a petition to review the denial of Diaz-Salazar's motion to reopen proceedings to consider whether his deportation should be suspended on grounds of extreme hardship pursuant to section 244 of the Immigration Act, 8 U.S.C. § 1254 (1976). The Immigration and Naturalization Service ("INS") also has filed a motion to dismiss the petition in No. 82-1130 for lack of jurisdiction and to reprimand petitioner's counsel and assess double costs. We grant the petition to dismiss No. 82-1130, but deny the motion to reprimand and assess costs. In No. 82-1610, we hold that the BIA did not abuse its discretion in denying petitioner's motion to reopen.

I.

Petitioner, Sebastian Diaz-Salazar, entered the United States illegally in 1974 and has been living and working in Chicago since that time. The Immigration and Naturalization Service moved to deport him in September of 1980, and at an October hearing he was granted voluntary deportation within 90 days. Diaz-Salazar appealed the decision to deport him to the Board of Immigration Appeals and requested a joint hearing with the woman whom he considered to be his common-law wife.[1] The BIA denied this appeal on February 4, 1981, and on March 27, the INS set the date of deportation for April 22, 1981. On April 3, 1981, Diaz-Salazar filed a petition

[1] Diaz-Salazar in fact was separated from a wife and two children whom he had left in Mexico in 1974. Thus the woman with whom he lived in Chicago and by whom he had two children born here was not his wife, although he seems to have considered her so. His attorney was not aware of the marriage in Mexico until he began to prepare the Petition for Suspension of Deportation.

for review with this court and obtained a stay of deportation pursuant to 8 U.S.C. § 1105a(a)(3) (1976).

By late May, Diaz-Salazar had acquired seven years residence in the United States and thus became eligible to apply for suspension of deportation on grounds of extreme hardship pursuant to section 244 of the Immigration Act, 8 U.S.C. § 1254.[2] In the months of June and July, he divorced his Mexican wife and legally married the woman with whom he had been living in Chicago. On August 6, 1981, he filed an application to suspend deportation pursuant to section 244, and on August 7, 1981, his previous petition before this court was dismissed as moot.

During the pendency of Diaz-Salazar's application to suspend deportation, the INS ordered him to report for deportation on December 17, 1981. On December 16, he filed an application to stay the deportation and a motion to reopen deportation proceedings before the administrative law judge. His attorney also filed for a temporary restraining order and for a writ of habeas corpus in federal district court. Judge Leighton denied this relief, however, on the grounds that Diaz-Salazar had failed to exhaust administrative remedies. A stay was granted by the administrative law judge, however, until a decision was reached upon his motion to reopen. That motion was denied, in turn, on January 6, 1982, on the ground that Diaz-Salazar had failed to make a prima facie showing of extreme hardship; and the stay was lifted. Diaz-Salazar appealed this denial to the BIA on January 15.

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[2] Section 244, 8 U.S.C. § 1254, provides that an alien who has been present in the United States for seven years and is of good moral character may apply for suspension of deportation on grounds of extreme hardship to himself or to his spouse or family members who are U.S. citizens or residents.

During the pendency of this appeal, the INS set January 29, 1982 as a new date for deportation. However, the INS apparently had not transmitted the record in the case to the BIA at this time; thus the BIA could not move forward expeditiously with the appeal. Diaz-Salazar's counsel therefore telephoned the BIA on January 25 to request a stay of deportation, but this request was orally denied. Counsel also filed a petition for habeas corpus, but it was denied by Judge Leighton on the grounds that the district court had no jurisdiction to review the case. On January 26, counsel filed a petition to review the oral denial of the motion to stay deportation, one of the two petitions which are before us for review (No. 82-1130). On March 30, 1982, the BIA formally denied Diaz-Salazar's motion to reopen, on the grounds that he had failed to establish a prima facie case that he would be able to obtain suspension of deportation pursuant to section 244. This denial is also before us for review (No. 82-1610), pursuant to 8 U.S.C. § 1105a(a). We shall consider these two petitions and the accompanying motion to dismiss in order.

II.

No. 82-1130

Our jurisdiction to review orders of the BIA is limited by 8 U.S.C. § 1105a(a) to "final orders of deportation." A denial of a stay of deportation is not such a final order. *Cheng Fan Kwok* v. *INS*, 392 U.S. 206 (1968); *Reyes* v. *INS*, 571 F.2d 505 (9th Cir. 1978). This court does not, therefore, have jurisdiction to review the oral denial of a request for the stay of deportation at issue in No. 82-1130.

Although this petition must therefore be dismissed on relatively straightforward jurisdictional grounds, we do not think that the filing of the petition is adequate grounds to sanction petitioner's attorney. Counsel was attempting

vigorously to represent the interests of his client at a time when the INS was moving to deport him during the pendency of a statutorily provided appeal. Had he been deported, that appeal to the BIA would have been moot. Counsel thus essayed several routes to stay deportation of his client pending a final determination of his substantive case under section 244. At argument, the government conceded that the district court's denial of Diaz-Salazar's petition for a writ of habeas corpus on jurisdictional grounds was probably incorrect. Thus, the proper appellate route may well have been to appeal that denial to us. But this jurisdictional issue had not been presented in exactly this posture in this circuit before, and there is no reason to assume that the proper course should have been immediately apparent to counsel. We thus deny the motion to reprimand and to assess costs, while granting the petition to dismiss No. 82-1130 for lack of jurisdiction.

III.

No. 82-1610

A denial of a motion to reopen deportation proceedings is, on the other hand, a final order of deportation and thus reviewable by this court. *Giova* v. *Rosenberg*, 379 U.S. 18 (1964). We will not overturn a decision of the BIA denying such a motion, however, absent an abuse of discretion. *Kashani* v. *INS*, 547 F.2d 376 (7th Cir. 1977); *Tupacyupanqui-Marin* v. *INS*, 447 F.2d 603 (7th Cir. 1971).

In order to prevail in a motion to reopen deportation proceedings for consideration under the extreme hardship standard of section 244, an alien must establish a prima facie case of eligibility for relief under that section of the Immigration Act. *INS* v. *Wang*, 450 U.S. 139, 141 (1980). Thus, unless Diaz-Salazar presented a prima facie case that he would be subjected to extreme hardship of the sort contemplated by section 244, the BIA was entirely

within its allowable discretion in denying his petition to reopen. Moreover, the *Wang* case instructs us that the application of the extreme hardship standard in an individual case is a task allotted primarily to the INS and not to the courts. *Id.* at 144. Although the agency must consider all relevant factors in making its determination, there is no evidence here that the INS has failed to do so or that the agency bused its discretion in concluding that the facts of this case did not place it within the category defined as extreme hardship by the case law.

The relevant facts which have been placed before the INS, BIA, and this court can be summarized as follows: The petitioner has a wife and two children under the age of three in Chicago; the children are natural-born citizens of the United States. He also has relatives in Mexico. Petitioner has a good job in Chicago and presumably, due to his lack of formal education and current economic conditions in Mexico, would have a difficult time finding similarly good employment in Mexico. Deportation would be very disruptive of the life which he and his second wife have built in Chicago, as well as psychologically distressing to them.[3] Considering all of these factors, however, we are nonetheless constrained to conclude that the BIA was within its discretion in finding that petitioner would not succeed in obtaining suspension of deportation under section 244 and in therefore denying his motion to reopen.

It is well established that economic hardship by itself does not constitute extreme hardship under section 244. *See, e.g., Mendoza-Hernandez* v. *INS*, 664 F.2d 635, 638

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[3] Petitioner urges that the BIA abused its discretion in not reopening to consider testimony submitted by a social worker to this effect. We have considered the material contained in an affidavit submitted by this social worker and find it merely to be cumulatively supportive of the facts already described herein.

(7th Cir. 1981). Moreover, economic conditions in an alien's homeland are not a dispositive factor in a suspension hearing. *See, e.g., Bueno-Carrillo* v. *Landon*, 682 F.2d 143, 147 (7th Cir. 1982). Even the Ninth Circuit cases decided after the *Wang* decision, upon which petitioner relies, require that some factor beyond the general misery attendant upon deportation present itself in order to justify relief under the extreme hardship standard. *Prapavat* v. *INS*, 662 F.2d 561 (9th Cir. 1981) (health problems of child); *Santana-Figueroa* v. *INS*, 644 F.2d 1354 (9th Cir. 1981), (advanced age of petitioner); *Mejia-Carrillo* v. *INS*, 656 F.2d 520 (9th Cir. 1981) (separation of teenage son from divorced father and from completion of high school).

In the case at hand, no special circumstances are presented sufficient to bring petitioner's situation within the extreme hardship standard. His children are still of pre-school age and thus less susceptible to the disruption of education and change of language involved in moving to Mexico. There are no unique reasons why petitioner, in comparison with the many other Mexicans in his situation now resident in the United States, will be unable to find employment upon returning to Mexico or why he or any member of his immediate family requires health care available only here. Thus, although we recognize the unhappy prospects which the petitioner faces, we cannot hold that the BIA abused its discretion in denying the petitioner's motion to reopen deportation proceedings.[4]

The petition for review is hereby

DISMISSED.

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[4] We are not insensitive to the fundamental human concerns raised in Judge Weick's dissenting opinion. Essentially, however, we believe the pain and hardship attendant upon the proposed de-

(footnote continued)

WEICK, *Senior Circuit Judge*, concurring in part and dissenting in part:

I concur in No. 82-1130 and respectfully dissent in No. 82-1610 for the reasons hereinafter set forth.

INS concedes that this court has jurisdiction to review the petition for review filed in No. 82-1610. The issue here is whether the Board of Immigration Appeals (BIA) abused its discretion in denying, without an evidentiary hearing, petitioner's motion to reopen his deportation hearing in order to apply for suspension of deportation pursuant to Section 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1254(a)(i). The motion was supported by affidavits to the effect that petitioner is gainfully employed in this country, earning $20,000 a year, and he and his present wife have been living in the United States for more than seven years and are the parents of two minor children, both under three years of age, born in the United States and thus became citizens of this country. This is evidence of extreme hardship which the children and their father and mother would suffer if the father was deported. Affidavits were also submitted as to the excellent reputation and industry of petitioner, an emigrant with a third grade education from Mexico to this country and as to his gainful employment here,

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(footnote continued)

portation of Diaz-Salazar is not distinguishable from the conditions surrounding a substantial number of similar deportations. The Supreme Court in *Wang* has unmistakably instructed us not to substitute our judgment for that of the Immigration and Naturalization Service in these matters. Further, this court is without authority to suspend the immigration laws because Mexico has currently fallen into economic crisis. In this connection, the INS may undertake to review all deportations to Mexico in the light of current conditions.

which he was unable to secure in Mexico. The economy, as a matter of common knowledge, is severely depressed in Mexico at the present time and the United States for some time has been confronted with serious problems in coping with unlawful migration of many unemployed Mexican citizens to this country, who crossed the broad borders of 2,000 miles between the two countries in order to obtain work and earn a living in the United States, which they could not obtain in Mexico. Petitioner also submitted to BIA a social evaluation of petitioner and his family by Ms. Luisa P. Maurer, MSW, with her resume attached thereto, which indicated that the deportation of petitioner would create an extreme hardship to petitioner, his wife and minor children and she would so testify at the hearing. BIA declined to reopen to hear this testimony of Ms. Maurer which was not previously available. BIA thus abused its discretion.[1]

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[1] The terrible conditions of distitution now prevailing in Mexico are graphically portrayed in an article on page 1 of The Wall Street Journal of November 17, 1982, entitled:

Desperate Journey
Hard Times at Home
Cause More Mexicans
To Enter U.S. Illegally

Many Are Caught in Texas;
Their Tales of Privation
Illustrate Extent of Crisis

'Peso Isn't Worth a Damn'

The article states that "proposed changes of U. S. immigration laws would grant amnesty to illegal aliens if they have resided 'continuously' in the U.S. since before January, 1980, but legislators haven't yet officially defined the term 'continuously'. (The legislation passed the Senate in August and is tentatively set to be voted upon in the House late this month or early December)."

Petitioner's two children, who are citizens of the United States certainly had legal rights to due process of law. The petition for review has merit and the children and their father and mother would have been subjected to extreme hardship if petitioner had been deported without an evidentiary hearing and an appropriate adjudication of the merits to which he and his wife and children were entitled.

In denying petitioner's motion to reopen the deportation proceedings for consideration of an application for suspension of deportation under Section 244(a)(i) of the Immigration and Nationality Act, INS and the majority rely principally upon a Per Curiam decision of the Supreme Court in *INS* v. *Wang*, 450 U.S. 139, *rehearing denied*, 101 S. Ct. 2037 (1981), *Per Curiam*. INS does not indicate that the Per Curiam related only to a ruling of the court not to grant the petition for a writ of certiorari and give the case plenary consideration, and the case was never admitted to the Supreme Court for decision on its merits. Justices Brennan, Marshall and Blackmun voted to grant the petition for certiorari and give the case plenary consideration.

The Per Curiam of the Supreme Court also pointed out deficiencies in the record which precluded granting certiorari and plenary consideration of the merits. Extreme hardship in that case was asserted as to two American born children, because neither child spoke Korean and would thus lose "educational opportunities if forced to leave this country". Respondents in that case also asserted some economic hardship to themselves and their children from the forced liquidation of their assets at a possible loss. These allegations were largely conclusory and none of them were sworn to in affidavits or otherwise supported by evidentiary materials. BIA ignored in the

present case, the regulation which requires facts relating to hardship be supported by affidavits, 8 C.F.R., Part 3, § 3.8. Affidavits and evidentiary materials were supplied in the present proceeding by petitioner.

On page 144 of the Per Curiam of the Supreme Court it is stated:

> Here, the Board considered the facts alleged and found that neither respondents nor their children would suffer extreme hardship. The Board considered it well settled that a mere showing of economic detriment was insufficient to satisfy the requirements of § 244 and in any event noted that respondents had significant financial resources while finding nothing to suggest that Mr. Wang could not find suitable employment in Korea. It also followed that respondents' two children would suffer serious economic deprivation if they returned to Korea.

In our case, the evidence was entirely different. It was shown by overwhelming evidence that the two minor children, a boy and girl, both under three years of age, who are American citizens, would suffer extreme hardship, and the Board of Immigration Appeals did not give this matter adequate consideration. Diaz-Salazar left Mexico because he was unable to support himself and he came to this country. It has been shown by overwhelming evidence that the two minor children would suffer extreme hardship if he were deported to Mexico, where he could not earn a living to support himself and the children when in fact that is the very reason he left Mexico. He could not even support himself. He now has a lucrative position in Chicago, earning $20,000 a year and it is suggested that he take them back to Mexico, where he could not even support himself. My concern is entirely based on the hardship suffered by these two minor children who are citizens of the United States, and I think that

they are entitled to due process of law and to have an adequate hearing. The Board of Immigration Appeals did not even allow the witness as to social evaluation to testify as to extreme hardship, and this is another ground of error.

In *Villena* v. *INS*, 622 F.2d 1352 (9th Cir. 1980), the court sitting en banc stated:

> The mere fact that an alien's child has been born in the United States does not entitle the alien to any favored status in seeking discretionary relief from deportation. *E.g. Wang* v. *INS*, 622 F.2d 1341 (9th Cir. 1980) (en banc). However, as we have repeatedly stated, the Board must consider what effect the deportation will have on the citizen child and whether the child will suffer extreme hardship. Because the nature and extent of hardship to a citizen child is difficult to discern without a hearing, circumstances that suggest that the alien's deportation would cause extreme hardship to his child warrant a hearing. *Wang* v. *INS*, 622 F.2d 1341 (9th Cir. 1980) (en banc).

The court remanded to BIA for an additional evidentiary hearing.

In *Mejia-Carriallo* v. *INS*, 656 F.2d 522 (9th Cir. 1981), the court stated:

> Under § 244(a), economic loss alone does not establish extreme hardship, but it is still a fact to consider in determining eligibility for suspension of deportation. *Jong Shik Choe* v. *INS*, 597 F.2d 168, 170 (9th Cir. 1979); *Urbano de Malaluan* v. *INS*, 577 F.2d 589, 594 (9th Cir. 1978). In addition, the Board must consider personal and emotional hardships which result from deportation. *Chan* v. *INS*, 610 F. 2d at 655. Included among these are the personal hardships which flow naturally from an economic loss—decreased health care, educational opportuni-

> ties, and general material welfare. The most important single factor may be the separation of the alien from family living in the United States. In fact, this court has stated that separation from family alone may establish extreme hardship. *Urbano de Malaluan* v. *INS*, 577 F.2d at 593-94;; *Yong* v. *INS*, 459 F. 2d 1004, 1005 (9th Cir. 1972); *see Bastidas* v. *INS*, 609 F. 2d 101, 104-05 (3rd Cir. 1979).

In *Wright* v. *INS*, 673 F. 2d 153, 158 (6th Cir. 1982), the court not only granted the petition for review, it also set aside the order of deportation and remanded with instructions to dismiss the order to show cause, thereby terminating the deportation proceeding. The court stated:

> The Board should have also related that Jasette had an equity in a house which she purchased from her earnings for several years as an employee of the Fisher Body Division of General Motors. She will lose this equity and have to take her child to Jamaica if the INS order of deportation is enforced, a very real disaster and hardship. The daughter who is a United States citizen should not be treated this way. In 1982, Jasette is still living in this country and supporting her five year old citizen daughter. With all the long delay, there is certainly nothing equitable about the order of deportation.

In *Rios-Pineda* v. *U.S. Dept. of Justice, Etc.*, 673 F. 2d 225 (8th Cir. 1982), the court held:

> Where aliens following their entry without inspection had been physically present in United States continuously since May 1, 1974 and had met seven-year continuous presence requirement during pendency of appeal, where husband alien in addition to being homeower had been gainfully employed since 1974, and where both aliens' children were born in United States and has resided there since birth, aliens were entitled to consideration and ruling on their claim that they were entitled to suspension of deportation on

> a proper motion to reopen. Immigration and Nationality Act, § 244(a)(1), 8 U.S.C.A. § 1254(a)(1).[2]

INS contends that the many decisions of the Ninth Circuit and Third Circuit conflict with the Supreme Court's decision in *Wang*. If there is any truth in this contention, why did not the INS petition the Supreme Court for certiorari in the many circuit court cases which it claims were erroneously decided? It is submitted that the Supreme Court in *Wang*, never intended to deprive a petitioner of his right to an evidentiary hearing in all cases.

The social evaluation by Ms. Maurer, MSW, indicated that the deportation of petitioner would create extreme hardship to petitioner and his family. It states:

> The couple state they see their future in terms of providing a home for their children in the U. S. Their lack of formal education would create extreme hardship to them in seeking employment in Mexico. Their citizen children would suffer unnecessarily. Mrs. Diaz' extended family is here and Mr. Diaz has lost contact with his extended family. His first wife is already living with someone else. From their perspective, they have nothing to offer their children there; no economic stability, no love of extended family members, and the insecurity intrinsic to the unknown.
>
> . . .
>
> It is evident that the couple have built strong family and community ties in the Chicago area and that

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[2] Other pertinent decisions are *Sida* v. *INS*, 665 F. 2d 851, 854 (9th Cir. 1981); *Prapavat* v. *INS*, 662 F. 2d 561 (9th Cir. 1981); *Ravancho* v. *INS*, 568 F. 2d 169 (3d Cir. 1981); *Hee Yng Ahn* v. *INS*, 651 F. 2d 1285 (9th Cir. 1981); *Santana-Figuero* v. *INS*, 644 F. 2d 1354 (9th Cir. 1981); *Tovar* v. *INS*, 612 F. 2d 794 (3d Cir. 1980); *Urbano de Malaluan* v. *INS*, 577 F. 2d 589 (9th Cir. 1978).

> they have achieved a position of respect through hard work and sacrifice which gives a significant boost to their morale and egos. Deportation threatens to destroy all that they have achieved over the years and to tear apart their close family nucleus and to deprive their children of all of the advantages of their birthright and of having a close family and security.
>
> Their deportation to Mexico would cause a severe blow to the entire family and would not be without impact to the community. Thus, it is my recommendation that the court be lenient in this case and allow the U.S. citizen children, Alfredo and Sylema, the joy, stability, security and devotion of a united family.

In my opinion, the finding of the BIA that petitioner did not establish a prima facie case is clearly erroneous, as it was proven by overwhelming evidence, and BIA abused its discretion in not granting an evidentiary hearing on the merits of the case. The Board neglected to demonstrate just how petitioner with a third grade education, who was unable to obtain employment in Mexico, when he unlawfully migrated to this country, and upon being deported to Mexico obtain employment to support himself, his wife and two minor American children in the United States. It is obvious that the wife and children would become destitute and a charge upon society here, if petitioner is deported to Mexico and does not take his wife and children with him, since he could not obtain a living even for himself. Therefore, petitioner would be motivated not to take his wife and children with him to Mexico and would go there by himself and suffer the consequences. In the United States his wife and American born children will be taken care of and not allowed to starve. In reality, the order of deportation, if petitioner takes his wife and American children with him to Mexico operates to sentence them to a life of destitution.

If the wife and children are permitted to remain in the United States, they can at least live and be happy "in the land of the free and the home of the brave".

The order of the Board denying petitioner's motion to reopen his deportation hearing in order to apply for suspension of deportation pursuant to Section 1244(a)(c) of the Act should be vacated and set aside, and the cause remanded for an evidentiary hearing and determination of the merits of the case.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Opinion by Judge Cudahy

Judge Weick, concurring in part and dissenting in part.

JUDGMENT — ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 1, 1983

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

Hon. PAUL C. WEICK, Senior Circuit Judge*

Nos. 82-1130 and 82-1610

SEBASTIAN DIAZ SALAZAR,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE, and THE BOARD OF IMMMIGRATION APPEALS,

Respondents.

Petition for Review of an Order of the Immigration and Naturalization Service and the Board of Immigration Appeals.

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* The Honorable Paul C. Weick, Senior Circuit Judge of the Sixth Circuit Court of Appeals, is sitting by designation.

This cause came on to be heard on the record from the United States Immigration and Naturalization Service and the Board of Immigration Appeals, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that in No. 82-1130 the motion to reprimand and assess costs is DENIED and the petition to dismiss is GRANTED; and in No. 82-1610 the petition for review is DISMISSED, in accordance with the opinion of this Court filed this date.

BOARD OF IMMIGRATION APPEALS
Washington, D.C. 20530

March 30, 1982

File: A22 690 817 — Chicago

In re: SEBASTIAN DIAZ-SALAZAR

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:

Virgil W. Mungy, Esquire
Virgil W. Mungy & Associates
127 North Dearborn, Suite 609
Chicago, Illinois 60602

ON BEHALF OF SERVICE:

Robert T. Vinikoor
General Attorney

CHARGE:

Order:
Sec. 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2)) —
Entered without inspection

APPLICATION: Motion to reopen

In a decision dated October 28, 1980, an immigration judge found the respondent deportable under section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2) but granted him the privilege of voluntary departure in lieu of deportation. On February 4, 1981, we entered an order dismissing the respondent's appeal. On December 16, 1981 the respondent directed a motion to reopen proceedings for consideration of an application for suspension of departation under section 244(a) of the Act, 8 U.S.C. 1254(a), to the immigration judge who

had presided over his deportation hearing. A decision was duly entered on January 6, 1982 denying the motion and an appeal to the Board was taken. Inasmuch as jurisdiction to entertain the respondent's motion to reopen lay with the Board rather than with the immigration judge, 8 C.F.R. 3.2, we shall regard the matter as if it were a motion properly filed rather than an appeal from a decision below.

In order to establish eligibility for relief under section 244(a)(1) an alien must show that he has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of his application, that he has been a person of good moral character for the same period, and that his deportation would result in extreme hardship to himself or to his United States citizen or lawful permanent resident spouse, children or parents. Absent a prima facie showing that the alien has met all of the statutory requirements for the relief sought, reopening of proceedings is inappropriate. *See Matter of Sipus*, 14 I&N Dec. 229 (BIA 1972); *Matter of Lam*, 14 I&N Dec. 98 (BIA 1972). The regulations require that a motion to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary materials. *See* 8 C.F.R. 3.8.

In support of the motion, the respondent has submitted an application for suspension of deportation (Form I-256A), in which he claims to have resided in the United States since May 25, 1974. We note that the Order to Show Cause issued against the respondent reflects May 24, 1974 as the date the respondent entered the United States without inspection, an allegation conceded by the respondent at the deportation hearing. Thus it appears that the requisite period of uninterrupted physical pres-

ence in this country has been satisfied. We conclude, however, that the respondent has made no showing that he or his two United States children will suffer the degree of hardship if deported that section 244(a) was designed to alleviate.

The respondent, a native and citizen of Mexico has lived in the United States for seven years and has been employed by Bake-Line Products in Des Plaines, Illinois for the duration of his residency. Judging from affidavits executed by his employer and two co-workers, the respondent enjoys the respect of his colleagues. Copies of recent income tax forms indicate that the respondent's industry and ability have been recognized and rewarded. Thus it is clear that the respondent, like most deported aliens, will likely suffer some degree of financial hardship and loss of economic stability if deported. Nonetheless, we do not believe that Congress intended to remedy this situation by suspending the deportation of all those who will be unable to maintain the standard of living at home which they have managed to achieve in the United States. *See Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978); *Matter of Sipus, supra*. As to the issue of hardship to the respondent's United States citizen children, we note that both children are under the age of three and thus too young to have developed any meaningful ties to the United States. The adjustments they must make to life in another country cannot be characterized as "extreme hardship." *See Aguilar* v. *INS*, 638 F.2d 717 (5 Cir. 1981); *Choe* v. *INS*, 597 F.2d 168 (9 Cir. 1979).[1]

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[1] A "social history" summary prepared by a social worker and presented by the respondent's counsel reiterates the fact that the respondent is able and industrious and notes that he clearly wishes to raise his family in the United States. Though true, these observations do not modify our conviction that the respondent's departure cannot be equated with extreme hardship.

Without addressing the issue of good moral character, we find that the respondent has failed to make out a case of extreme hardship and thus is statutorily ineligible for suspension of deportation. After a thorough review of the file, we also conclude that even if a prima facie showing had been established, we would deny the motion on discretionary grounds.

At the time of his deportation hearing, on October 28, 1980 the respondent was granted the only form of relief for which he was eligible, voluntary departure. The sole argument underlying his appeal to the Board was the contention that despite his 90 day voluntary departure grant, his case should be "held" and reconsidered in conjunction with an application for suspension of deportation which would soon be submitted by his wife. From evidentiary material which is now but was not then a part of the record, it is clear that while the respondent may have been living with a woman by whom he had fathered two children, he was not her husband, as he claimed. He was, in fact, married to another woman who was still living in Mexico. There is nothing in the file which suggests that any effort was made to correct this misinformation until the respondent's seven year residency requirement had been satisfied.[2] We find that the respondent's apparent lack of candor coupled with his reliance on what we perceive to be dilatory tactics constitutes sufficient basis to deny the motion on purely discriminatory grounds. *See Matter of Lam, supra.* Thus, on discretionary as well as statutory grounds, we conclude that reopening of proceedings is unwarranted.

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[2] Documents submitted with the suspension application indicate that the respondent did eventually divorce his first wife on June 25, 1981 and married the mother of his two United States citizen children on July 11, 1981.

ORDER: The decision of the immigration judge is vacated on jurisdictional grounds and the motion to reopen deportation proceedings is denied.

/s/ *David L. Milhollan*

Chairman